

# Compassionate Capital Mitigation

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## I. INTRODUCTION

It is a truism in capital defense advocacy that compassion is *the* antidote to the fear and vengeful anger that otherwise compel jurors to return sentencing verdicts of death. When in practice, I saw that the defense's duty to investigate "compassionate or mitigating factors stemming from the diverse frailties of humankind"<sup>1</sup> affects every single aspect of defense strategy, from pre-trial motions and voir dire, to the trial for guilt/innocence, to the sentencing hearing proper, and all throughout the plea negotiations that can unfold along every step of the way.<sup>2</sup> And judges, in their position as arbiters of admissible evidence, have recognized the crucial role of emotionally-inflected, humanizing considerations in a sentencing process that must permit jurors to evaluate "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."<sup>3</sup>

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<sup>1</sup> Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

<sup>2</sup> In a prior analysis, I have argued that the unique procedural and strategic dynamics of capital cases compel capital defense advocates to consider all aspects of litigation strategy through the prism of the sentencing defense. Jesse Cheng, "Mitigate from Day One": *Why Effective Defense Advocates Do Not Prioritize Liberty over Life in Death Penalty Cases*, 14 OHIO ST. J. CRIM. L. 231 (2016). This practice is consistent with the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, which the Supreme Court has recognized as an articulation of prevailing professional standards for effective defense representation. See Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635 (2013) (analyzing Supreme Court decisions that have referenced the *Guidelines* in relation to Sixth Amendment jurisprudence); see also ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, 31 HOFSTRA L. REV. 913, 1047–48 (2003) [hereinafter ABA GUIDELINES] (requiring that the defense advance an "integrated defense theory . . . during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument").

<sup>3</sup> Lockett v. Ohio, 438 U.S. 586, 604 (1978). In a comprehensive benchbook that details differences in capital trial procedures across state and federal jurisdictions, one author states that although a plurality of the high court upheld a jury instruction "not to be swayed by mere sentiment, sympathy, [or] passion," judicial best practice is in fact to acknowledge the deliberate impact of sympathy-invoking evidence offered by both the prosecution and defense during the penalty phase. O.H. Eaton, *Penalty Phase*, in PRESIDING OVER A CAPITAL CASE: A BENCHBOOK FOR JUDGES 161, 245

Studying capital mitigation, I have found it increasingly important to specify what, exactly, “compassionate” sentencing evidence is, and how, exactly, it operates to mitigate against the death penalty. I have come to believe that the cultivation of compassion contains within it nothing short of a structuring theory to explain the practice of capital mitigation, and, by extension, much of the practice of capital defense writ large. This piece seeks to articulate this structuring theory so that defenders, jurists, factfinders, and prosecutors can resort to a powerful conceptual shorthand for understanding the sentencing defense requirements so integral to effective assistance of counsel in capital cases.<sup>4</sup>

When I refer to compassionate mitigation, I refer to the broad swath of the defense’s sentencing evidence that does *not* involve residual doubt about the capital offense. Most would agree in principle that lingering uncertainty about whether the defendant even committed the crime he is now being sentenced for militates in the direction of punitive leniency.<sup>5</sup> The defendant’s disproportionate culpability—compared to other, more culpable co-defendants in the same case (who did not get death) or other, similarly culpable defendants in different cases (who also did not get death)<sup>6</sup>—is also fairly uncontroversial as a mitigating factor. Here, I am speaking of evidence that contemplates the defendant’s life on its own terms: the enormous

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(William J. Brunson et al., eds., 2010) (quoting *California v. Brown*, 479 U.S. 538, 539 (1987)). Another author in that volume notes that *Woodson*’s statement on “compassionate” mitigating factors is bound up with *Lockett*’s constitutional mandate of individualized capital sentencing. Penny J. White, *Capital Cases and Federal Constitutional Issues*, in *PRESIDING OVER A CAPITAL CASE: A BENCHMARK FOR JUDGES* 1, 17 (William J. Brunson et al., eds., 2010). Similarly, a resource guide for judges on the administration of federal capital cases makes a point of highlighting the characteristically “emotional” nature of sentencing mitigation. MOLLY TREADWAY JOHNSON & LAURA L. HOOPER, *RESOURCE GUIDE FOR MANAGING CAPITAL CASES, VOLUME I: FEDERAL DEATH PENALTY TRIALS* 54 (2004).

<sup>4</sup> See *Williams v. Taylor*, 529 U.S. 362 (2000) (finding trial counsel ineffective for failing to investigate the defendant’s childhood abuse and borderline intellectual disability); *Wiggins v. Smith*, 539 U.S. 510 (2003) (finding trial counsel ineffective for failing to investigate an adequately broad range of mitigation sources); *Rompilla v. Beard*, 545 U.S. 374 (2005) (finding trial counsel ineffective for failing to investigate the defendant’s prior conviction); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (finding trial counsel ineffective for failing to investigate evidence of the defendant’s brain damage); *Sears v. Upton* 561 U.S. 945 (2010) (per curiam) (finding trial counsel ineffective for failing to investigate evidence of the defendant’s cognitive impairment).

<sup>5</sup> Based on my time in the practice, however, the consensus among defense advocates is that jurors who have just returned a conviction of guilt beyond a reasonable doubt are unlikely to believe that there exists any lingering uncertainty about the crime. See Sean Kennedy, *Special Challenges in Capital Trial Mitigation: Reframing to Communicate the Essence of Your Client*, in *TELL THE CLIENT’S STORY: MITIGATION IN CRIMINAL AND DEATH PENALTY CASES* 341, 383–84 (Edward Monahan & James Clark, eds., 2017) (noting that according to experienced capital litigators, it is strategically ill-advised to argue residual doubt with death-qualified jurors, who tend to be conviction-prone).

<sup>6</sup> With respect to the latter issue of comparative proportionality, the Supreme Court has ruled that although some state schemes allow an appellant to contest his death sentence in comparison with lesser sentences imposed in similar capital cases, such proportionality review is not a constitutional requirement under the Eighth Amendment. *Pulley v. Harris*, 465 U.S. 37 (1984).

remaining sphere of mitigation's factual universe that encompasses his birth conditions, intergenerational social and medical history, neurological development, genetics, impairments, physical and psychological suffering, developmental obstacles, so-called "good character" and other redeeming characteristics, subjective worldview, culture, dreams, hopes, disappointments, remorse, and all other forms of narrative-driven, empathy-inducing considerations that concern the defense practitioner in the quest to advocate, zealously, against the ultimate penalty. As my late mentor—a capital mitigation pioneer who left a defining legacy in the work<sup>7</sup>—once observed, "No list of specific factors can adequately describe the diverse elements of mitigation, whether or not related to the offense for which the offender is on trial. The possibilities of mitigation are limitless."<sup>8</sup>

The compassionate tendencies of different jurors—each with their own sets of personal beliefs and values, worldview-defining life experiences, ever-evolving concerns and priorities, etc.—will be potentially effectuated by vastly different sorts of evidence. And, indeed, each capital juror is entitled to cast their sentencing ballot in accordance with their own individualized moral judgment, regardless of how other jurors assess the evidence.<sup>9</sup> Consequently, advocates and judges ought to think as expansively as possible about compassionate factors that might be found in any aspect of a defendant's background, character, record, and circumstances of the offense. Herein perhaps lies a reason for why a satisfactory gloss on compassion in capital mitigation has not, to date, been readily available. It eludes easy definition; and arguably, it ought not to be so easily defined, in order to avoid undue restrictions (either self-imposed by the defense or through rulings from the bench) on facts introduced at sentencing.

## II. THE PREVAILING VIEW LOCATES COMPASSION IN CONSTRAINED CHOICE

The notion of compassion that effective defense practitioners embrace has long reflected a thematic center of gravity that shapes the sorts of evidence developed in the penalty phase defense. One highly regarded academic-advocate noted some time ago, "Counsel's demonstration that upbringing and other formative influences may have distorted the defendant's personality or led to his criminal behavior may spark in the sentencer the perspective or compassion conducive to mercy."<sup>10</sup> Another

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<sup>7</sup> Maurice Chammah, *Scharlette Holdman, a Force for the Defense on Death Row, Dies at 70*, N.Y. TIMES, (Jul. 22, 2017) <https://www.nytimes.com/2017/07/22/us/scharlette-holdman-dead.html>.

<sup>8</sup> SCHARLETTE HOLDMAN, THE NATURE AND ROLE OF MITIGATING EVIDENCE IN CAPITAL CASES 4 (undated memorandum on file with author). See also *Ayers v. Belmontes*, 549 U.S. 7, 26 (referring to the existence of "potentially infinite mitigators").

<sup>9</sup> *Mills v. Maryland*, 486 U.S. 367, 375 (1988).

<sup>10</sup> Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 336 (1983).

authoritative voice in the work declared that successful defense strategies “suggest a deterministic theory of the defendant’s behavior. The artful defense lawyer describes a narrative chain from a childhood of abuse, neglect and family turmoil, to a youth in social or penal institutions and an introduction to brutality and crime, up to the present murder.”<sup>11</sup> If to have compassion for the defendant is, as the word’s etymology implies, to “suffer with” him, then the focal concern of compassionate mitigation is the defendant’s personal experiences of pain, as deeply contextualized in a biography of challenges, one after another, that finally came to a head in the worst acts of his life.

These thoughts outline one possible conceptual framework that might explain how compassion functions to mitigating effect. According to this view, the essence of compassion seems to turn on the defendant’s biographical circumstances of *constrained choice*, as achieved through repeated assaults on his being. Threatening forces beyond the defendant’s control—exposure to physical, psychological, and sexual trauma, genetic predisposition to mental illness, geopolitical gamesmanship that fractured families through proxy wars, a childhood in an impoverished, violence-riddled neighborhood with no father and a drug-addicted mother—collectively worked to strip away possibilities for this individual to fulfill his human potential. Based on such facts, some factfinders might reasonably conclude that an individual whose existence is characterized by constrained choice should be judged with more leniency than someone who committed a comparable offense, but whose circumstances were not similarly compromising.

Bound up with this comparative analysis is the impulse to extend to the defendant the mercy that often comes with sympathy. We can all identify with suffering. We can all “suffer with” the experience of the downward spiral that takes on a life of its own, of finding ourselves in dire straits with seemingly little choice but to act in ways we are not proud of. As the saying goes, we are all only human—and this gets to the essential idea. When mitigating evidence can demonstrate how one thing led to another in a way that cut off opportunities again and again all throughout life, sentencers can perceive the defendant as a human being in all his frailty, rather than as an evildoer who killed simply because he wanted to.<sup>12</sup> They can find that a more complete picture of the defendant’s full personhood makes his crime more understandable and therefore less culpable, such that justice must call for an outcome more forgiving than the most extreme punishment on the books.

The constrained choice model of compassionate capital mitigation seems to make good sense at first blush. It appeals to the intellect (analytical comparison) as

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<sup>11</sup> Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 381 (1983). *See also* Deanna Logan, *From Abused Child to Killer: Positing Links in the Chain*, THE CHAMPION, Jan.-Feb. 1992 (also invoking the chain metaphor to explain the capital murder as a product of overwhelming life history events).

<sup>12</sup> *See* PAUL KAPLAN, MURDER STORIES: IDEOLOGICAL NARRATIVES IN CAPITAL PUNISHMENT 89 (2012) (“The primary script at work in [the] prosecution narrative is: *killers are inherently evil*.”) (emphasis in original).

well as to the emotions (sympathetic mercy). Indeed, its logical and affective dimensions appear consistent with formal guilt-innocence defenses such as duress, necessity, provocation, and diminished capacity, all of which negate criminal culpability, via justification or excuse, precisely because in some significant sense, the defendant just did not have much choice in the matter.<sup>13</sup> Moreover, the conceptualization of constrained choice provides the defense with an anchoring theme to clarify for themselves and others the nature of compassionate mitigation. This is particularly critical in capital cases, where confusion about mitigation can very easily lead to dismissal of evidence (whether by factfinders or judges) that *should* be brought to bear in the sentencing process.<sup>14</sup>

But constraint of choice may not provide as stable a conceptual foundation for the cultivation of life-affirming compassion as the high stakes of the death penalty warrant. Jurors could reason that the defendant's lifelong suffering and its curtailment of potential for human flourishing have left him broken beyond repair so that putting an end to his life may actually be the most merciful thing to do. Or they could believe that the deterministic forces that accumulated enough momentum to make him kill are now too powerful to contain, and that said forces conceivably will compel him to kill again. Taken to its logical extreme, constrained choice can be interpreted as hard determinism for all, so that sentencers can justify their anger, vengefulness, and support for the death penalty as themselves but the result of an unalterable cosmic chain of molecules bumping into one another.<sup>15</sup> And if constrained choice is opened up to even the slightest degree of decision-making agency, jurors can maintain that however difficult the defendant's life circumstances, no matter how much pain he was forced to endure, he could have always bucked up and exercised the moral discipline to make the right choices regardless.

Moreover, traditional guilt phase defenses speak to factors that directly impacted the tried conduct in a compressed time frame leading up to the act's commission. In a typical capital sentencing trial, the defense must attempt to explain the murder by way of phenomena that generally stretch out significantly further backwards in time, are likely more numerous, combinative, and nebulously indirect, and that therefore lack the satisfying explanatory power of guilt phase defenses that

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<sup>13</sup> For a classic overview of the American system of criminal defenses, including their relation to a defendant's reasoning processes and exercise of free will, see Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199 (1982).

<sup>14</sup> See generally Peter Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1 (1995) (surveying empirical studies that demonstrate jurors' confusion about mitigation-related instructions in capital sentencing); Robert J. Smith et al., *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221 (2014) (analyzing the life histories of executed individuals to argue the insufficiency of capital mitigation procedures in ensuring that only the most extremely culpable offenders receive the death penalty).

<sup>15</sup> An explicit statement of a hard determinist view of mitigation is offered by Avi Frey, *Determinist Mitigation in Capital Cases*, 40 N.Y.U. REV. L. & SOC. CHANGE 75 (2015).

can tout simple cause-and-effect relations. Thus, the constrained choice framework of mitigation sets up the defense with a most formidable task. If the mitigation argument is to be that the crime was the result of limited possibilities, the smart prosecutor's standard of comparison will always be the individual forced into a criminal act with a gun pointed at his head.

Taken together, these considerations reveal a serious shortcoming of constrained choice as the theoretical core of compassionate mitigation. The defendant's vulnerability to uncontrollable forces and his experience of severely restricted life opportunities may engender sympathetic fellow-feeling among some jurors—but for many others who undertake deliberations also exercising good reason, it very well may not. To put this more specifically, a reasonable juror's appreciation of the defendant's impairments, challenges, and lifelong suffering is necessary, but not always sufficient, for compassion. Capital prosecutors and experts are intimately aware of this fact and use it to their advantage. One forensic psychiatrist who has served as a prosecution expert in high-profile cases is notorious within the death penalty defense bar for his ability to depict serious psychiatric impairments in a manner that wholly preserves a defendant's ability to choose, rationally and deliberately, to kill.<sup>16</sup> If, for some, constrained choice is the antidote to vengeful punishment, then the desire for self-agency is, for others, a most compelling anti-antidote. Constrained choice fails when it does because whatever tribulations the defendant faced in life, reasonable jurors are perfectly entitled to believe in an individual's ability to choose, with all the consequences that come with it.<sup>17</sup>

### III. COMPASSIONATE MITIGATION EMBRACES CHOICE BY EXPLAINING IT

There is a sound rationale for why defense advocates would be drawn to constrained choice as the essence of compassion. Without fail, the prosecution's sentencing narrative will describe the commission of the killing with unstinting emphasis on the defendant's indulgence in his full decision-making powers: he chose to buy the gun; he chose to buy the ammunition; he chose to load the chamber; he chose to get in his car; he chose to drive to the victim's residence; he chose to break into her home; he chose to disengage the weapon's safety; he chose to wait until she turned off the lights; and so on. Prosecutors know that this approach

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<sup>16</sup> Dr. Park Dietz was hired by prosecutors in capital cases against Andrea Yates and Theodore Kaczynski.

<sup>17</sup> In one empirical study of more than 130 death-qualified jurors who sat on a capital case all the way through sentencing, 23.5% of respondents indicated that the fact that the defendant was intellectually disabled did not or would not bear on their sentencing decision. 40.4% reported no effect on their deliberations if the defendant had a history of mental illness. 47.5% claimed to remain unaffected if the defendant experienced prior institutionalization without meaningful assistance; 61.6% if he underwent serious child abuse; and finally, 83.6% if he came from a background of extreme poverty. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559 (1998).

resonates with capital jurors whose default tendencies already lean toward privileging self-determination over determinism, straightforward accountability over multifactored vulnerability.<sup>18</sup> The logical counterstrategy, it would seem, is to go all-in on zealously contesting the notion of the defendant's ability to choose, zooming out to intractable forces that relentlessly hindered his freedom to thrive—beginning even before he was born. What if, however, the idea of choice can be pressed into the service of cultivating compassion? What if compassionate mitigation can somehow incorporate a robust sense of agency that actually feeds into constrained choice's head-and-heart appeal to analytical comparison and sympathetic mercy? What if there is a framework that can link suffering with choice so that both together are necessary *and* sufficient for a complete theory of compassion?

Compassionate mitigation, as I propose to conceptualize it here, is any evidence that may explain how the choices the defendant made throughout life became actual possibilities of action for him. Any individual has the ability to undertake countless acts at any given moment; but a person will not perceive the vast majority of those possibilities to be choices that are genuine options to actually pursue. For example, one very important choice that the defense must explain in a capital case—in general, *the* most important choice to explain<sup>19</sup>—is the defendant's decision to kill. Most human beings simply would not consider the commission of homicide to be actionable conduct in our lives. Of course, we all can choose, in the abstract, to murder any time if we so wish: we are decision-making agents with the power to exercise our will as we please. For capital mitigation, however, this is exactly the point. We are *not* abstract decision-making agents. We exist within individualized, meaning-imbued realities born of particular histories<sup>20</sup> that led to how we construct our present engagements and preoccupations, all of which played out such that the prospect of taking another's life just will not present itself to most of us as a meaningful and realistic course of action. But of course, it did for the defendant. The

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<sup>18</sup> See generally Marla Sandys et al., *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 393 (James R. Acker et al., eds., 3d ed. 2014) (providing an overview of social scientific research on the effects of capital voir dire on juror deliberations concerning guilt and sentencing).

<sup>19</sup> The observations offered above by Goodpaster, *supra* note 10, and Weisberg, *supra* note 11, reflect the longstanding recognition of the need to explain the capital homicide as the culminating event of the mitigation life narrative. See also Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 356 (1979) (“[T]he jury wants to know why your client committed the crime, or at least why your client thinks he or she did it.”); Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695, 708–11 (1991) (detailing examples of various sentencing trial strategies that speak directly to the commission of the offense).

<sup>20</sup> The specific histories that the ABA's *Guidelines* identify as necessary for investigation include medical, family, social, educational, military, employment and training, and correctional. ABA GUIDELINES, *supra* note 2, at 1022–23.

purpose of compassionate mitigation, then, is to confront the question of why the defendant killed by explaining how this particular human being came to perceive his choice to kill as a viable decision to act upon.

And not just the choice to kill. As the experienced authorities of the practice suggested earlier, effective capital defense practice requires that the narrative of compassionate mitigation span the entirety of the defendant's existence so that sentencers are availed of an adequately comprehensive picture of the life they are to judge. The case law would require, again, that the choices that figure into the compassionate narrative of the defendant's existence be able to pertain to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."<sup>21</sup> Therefore, the threatening forces that contribute to the defendant's suffering remain as relevant as ever—the intergenerational trauma, the differential exposure to frontal lobe-impairing neurotoxins, the predatory surveillance practices of local law enforcement, the schizophrenic hallucinations leading up to the offense. But instead of attempting to convince jurors that the defendant's actions throughout life were situationally coerced, compassionate mitigation vies to explain how the defendant, through the way he personally experienced these forces, came to make sense of the possibilities that he saw for himself. So, it was not that the defendant merely chose to become a drug dealer. From the perspective of his lived experience, the decision to sling dope was a resolution to go out into the world and escape a home life dominated by an explosively violent stepfather, to assume a role in something bigger that could transcend this domestic misery by earning him autonomy and respect like it did for his older brother before he was shot, versus staying in school where the kind encouragement of an overworked shop teacher proved the only exception in an institution that reinforced the message, repeated daily by his heroin-addicted mother at home, that who he is and the loneliness he felt since his brother's murder were of consequence to no one.

Whereas the notion of constrained choice attempts to minimize the fact of choice, a theory of *explained choice* wholly owns up to the decisions that the defendant made by responding to jurors' natural curiosity about the origins of those decisions. Although it may indeed do so at times, explained choice does not bear the theoretical burden of having to excuse or justify the defendant's life choices that eventually brought him to the ultimate decision to commit capital murder (after all, if the decision to kill itself could be excused or justified as it would be under the traditional guilt-phase defenses, then the defendant would not be convicted and facing the certainty of harsh punishment.<sup>22</sup>). Rather, this approach locates the mitigating power of compassion in rendering these choices intelligible by affording

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<sup>21</sup> Lockett v. Ohio, 438 U.S. 586, 604 (1978).

<sup>22</sup> See ABA GUIDELINES, *supra* note 2, at 1060 ("Often, a mitigation presentation is offered not to justify or excuse the crime but to help explain it.") (footnote omitted) (internal quotation marks omitted).



a more fully informed, empathetic understanding of the individualized life experiences through which those choices arose.

Explained choice speaks to the head as well as the heart. With respect to the intellect, the mitigating effect of explained choice lies in two distinct kinds of comparative analysis. First, jurors can assess the defense's explanations about the defendant's life choices to determine whether he truly compares to the worst-of-the-worst type of offender whom the prosecution casts him to be: the killer who caused suffering for pleasure, selfish gain, or wanton disregard for human life, simply because he wanted to.<sup>23</sup> Second, sentencers can compare the defendant's life story and the possibilities he discerned against the lives and choices of others who did not face comparable challenges—including those of jurors themselves. Sentencers can reasonably deduce the appropriateness of judicious restraint in contemplating how to pass judgment on choices they did not have to make, on the fate of a life they did not have to live. A constraint-focused approach may certainly invoke both these aspects of comparison. But explained choice offers a more credible set of comparisons that is more engageable, because it assumes a common premise of volitional will: the prosecution's depiction of choice versus the defense's, as opposed to the apples-and-oranges contrast between agency and determinism. This shared philosophical ground is especially vital in a system of law—and a culture of lay belief—in which criminal accountability is tightly entwined with judgments about the appropriateness of the choices that individuals make.<sup>24</sup> I would submit, in fact, that culpability is relieved under traditional affirmative defenses like duress not because they deny agency, but because they explain in comprehensible terms how the otherwise criminal behavior emerged as a viable course of action for the defendant to seriously consider and ultimately pursue. Such a formulation would make for a more internally consistent substantive criminal law.

With respect to the affective appeal of explained choice, the imperative to cultivate a fuller appreciation of how the defendant interpreted his life possibilities feeds into sympathetic mercy. Explained choice delves into the complex of felt meanings through which the defendant absorbed, registered, and vied to overcome threats of annihilation to his body and spirit all throughout life. But instead of reducing him to a state of passive victimization, compassionate mitigation highlights the profoundly individualized manner in which he exercised his human agency when confronting hardship. The process of putting oneself in this narrative engenders respect for and fellow-feeling with the defendant as an autonomous being worthy of

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<sup>23</sup> Here, I recall the Supreme Court's reversal of a death sentence for the state's failure to show that the defendant exhibited "a consciousness materially more depraved than that of any person guilty of murder." *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (internal quotation marks omitted).

<sup>24</sup> See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 166–67 (1947) ("[O]ur criminal law rests precisely upon the same foundation as does our traditional ethics: human beings are 'responsible' for their volitional conduct."); WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., *HANDBOOK ON CRIMINAL LAW* 349–51 (1972) (analyzing the centrality of volitional will in the voluntary act and *mens rea* requirements of Anglo-American common law).

dignity. If an effective defense depends on fostering human identification with the client,<sup>25</sup> then the defense's effort to reveal his life challenges through the lens of human autonomy functions to elicit an equivalent response of human-to-human understanding. Explained choice thereby enables jurors to dignify the suffering of a three-dimensional protagonist who encounters stresses, quandaries, and choices that cumulatively resulted in the fateful, explosive expression of pain for which he must now answer. By showing how a fellow human being chose to make do as he confronted his binds and predicaments in the way he uniquely lived them, compassionate mitigation creates a more potent form of sympathy founded on respect, rather than on mere pity.

#### IV. EXPLAINED CHOICE MORE ACCURATELY ACCOUNTS FOR ACTUAL DEFENSE PRACTICE

How explained choice is presented as an explicit feature of the mitigation argument is counsel's strategic call. What the case law makes clear, nonetheless, is that effective assistance requires that a "reasonable" mitigation investigation serve as an adequate factual basis for the defense's sentencing strategy.<sup>26</sup> And when it comes to the painstaking investigative processes that provide the empirical foundations of the penalty defense, explaining choice, not constraining it, more faithfully reflects the pound-the-pavement realities of what effective capital defense advocates really do. In this final section, I address three aspects of the practice that significantly exceed the functional limitations of a constraint approach, based on my own observations within the work.

First, explained choice fully commits to compassion's epistemological orientation, positioning the factfinder's evaluation of the defendant's character, record, and offense from within the vantage point of the defendant's lived experiences. To the fullest extent possible, compassionate mitigation investigation attempts a comprehensive and vivid reconstruction of the defendant's existence in the subjective world he inhabited, event by event, at times even moment by moment. Because constrained choice is, by contrast, reductive, in the end channeling the scope of the defendant's inner life to a generic sense of helpless surrender, its focus skews toward more removed analyses of the external forces (historical, sociological, biological) that circumscribed the defendant's possibilities. The advocates I learned from certainly pursued these same intellectual analyses, but took them to be mere

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<sup>25</sup> "[C]ounsel must be able to humanize the defendant." ABA GUIDELINES, *supra* note 2, at 1009.

<sup>26</sup> In attempting to determine "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [defendant's] background was *itself reasonable*," the Supreme Court has held that "[i]n assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms . . .'" *Wiggins v. Smith*, 539 U.S. 510, 523–24 (2003) (emphasis in original) (citation omitted).

starting points for further investigation. Instead of constituting the mitigation argument proper, these analyses operated as rough heuristic frameworks to begin to flesh out the felt meanings behind the defendant's lived experiences. Empirically, this is harder work: there is much more information—the entire lifespan of the defendant's internal reality—to account for. But for genuine compassion to be possible, the defense must procure for jurors some subjective experience to *feel with*.

Hence, a central part of this defense approach is the intentional effort to access this inner world through the people who can speak to it: the human beings who knew the defendant best, including, of course, the client himself. As critical and time-consuming as mitigation's various tasks are (records collection and analysis, strategic collaboration with experts, creative presentations of documentary evidence, the general management of voluminous amounts of information), it is the ongoing dialogue and consistent relationship-building with potential penalty phase witnesses that form the bread-and-butter of investigative practice.<sup>27</sup> It was routine in the effective defense teams I worked with to establish a schedule of weekly meetings, lasting throughout the whole duration of the case, with the defendant and his closest loved ones. Through skillful engagement with these human sources, the defense often finds that compassion figures into unexpected aspects of the sentencing defense. For instance, the obvious strategy for rebutting aggravating evidence of the defendant's criminal history is to "re-litigate," as it were, the validity of prior convictions.<sup>28</sup> But an explained choice framework demands, in addition, that counsel also "re-mitigate" these offenses by interviewing those who can tell about the defendant's affective experiences leading up to his actions, making those decisions more emotionally comprehensible and at times deeply humanizing.<sup>29</sup>

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<sup>27</sup> "[I]nterviewing is the core skill of preparing for penalty phase." Holdman, *supra* note 8, at 23. The ABA's supplementary guidelines on mitigation further underscore the longitudinal nature of life history interviews:

Team members must conduct in-person, face-to-face, one-on-one interviews with the client, the client's family, and other witnesses who are familiar with the client's life, history, or family history or who would support a sentence less than death. Multiple interviews will be necessary to establish trust, elicit sensitive information and conduct a thorough and reliable life-history investigation.

*Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 689 (2008).

<sup>28</sup> "Counsel must . . . investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting ABA GUIDELINES, *supra* note 2, at 1027).

<sup>29</sup> Sean O'Brien, the capital litigator and law professor, told me a story of a former client of his named Joe. In an interview with a childhood friend of Joe, this witness explained to Professor O'Brien that when she was eight years old, she was playing with Joe's sister at their house when Joe's father came into the bedroom. He forced the witness to take off her clothes and began molesting her. Joe, who was twelve at the time, returned home from school to find his father molesting his sister's friend. He was going to tell mom, Joe told his father. The father struck Joe in the jaw with a closed fist and knocked him unconscious, causing Joe to bite through his tongue. A search of the hospital records would reveal that Joe had purportedly suffered his injury falling out of a tree. Juvenile records after the incident indicated that Joe was habitually truant from school, and that he had been convicted of abducting an eight-year-old girl on a freight train. In fact, Joe, fearing for his young neighbor's safety,

Second, although compassionate mitigation foregrounds the defendant's suffering in response to the prosecution's denial or trivialization of it, the fact of suffering alone is by no means the exclusive focus of the practice. Investigation also reveals how he chose to deal with his suffering in ways that were variously courageous, cowardly, hopeful, resigned, cynical, reactive, shortsighted, self-sacrificing, or self-reflective.<sup>30</sup> An overwrought emphasis on suffering alone flattens the three-dimensionality of the defendant's personhood. It is precisely what feeds into the belief that the defendant can be discarded like an unsalvageable broken object. Explained choice instead promotes the idea that in a truly individualized sentencing process, recognition of a defendant's humanity is bound up with respect for the full complexity of his personhood, with all its inconsistencies and inner conflicts. And when rendering the defendant a believably complex human being worthy of dignity, there is, again, no better source of humanizing evidence than human actors—but not only the defendant and those close to him. Complexity is most meaningfully grasped through the widest range of perspectives accessible.<sup>31</sup> In theory, effective advocates consider just about every person who somehow crossed paths with the defendant at some point in his life to be worthy of outreach, even if their connection with him appears less than substantial.<sup>32</sup> It is through the breadth

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had been staying home from school in order to protect her from his father. She and Joe had hopped the freight train to run away together, no longer able to tolerate the constant threat. Prosecutors presented this juvenile record as evidence in aggravation during Joe's capital sentencing trial.

<sup>30</sup> See Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 880 (2008) ("Even though [defendants] have eventually succumbed to the substantial criminogenic forces to which they have been subjected, their life narratives also are often filled with meaningful struggles and admirable attempts to overcome the obstacles that have been placed before them.") Frey, *supra* note 15, cites Haney as "the principal contemporary advocate . . . of determinist logic." *Id.* at 76. I interpret Haney's work, however, as carving out an important role for choice in the sentencing defense. See Haney, *supra*, at 856 (stating that the mental health sciences that mitigation draws from seek to understand "the full extent of the many ways that past experiences can change the direction of people's lives and influence the choices that they make along the way") (emphasis added).

<sup>31</sup> See Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 732 (2008) ("A successful capital defense investigation . . . is one that leaves no stone unturned in examining a wide range of evidence from a broad set of sources to discover and communicate the humanizing events and conditions that exist in the life of every capital client.").

<sup>32</sup> A witness I once tracked down was an elderly man who lived a few houses down the road opposite my client's childhood home. This neighbor actually never had much direct interaction with the defendant. The man shared, however, that even based on his observations from a distance, he had the strong impression that there always seemed to be a sadness weighing upon my client. Never, he said, had he ever seen someone so young look so sad. As the neighbor stood beside me on his front doorstep, falling silent to gaze at the client's old house, I could feel the empathy that this gentleman held for the child he observed across the street. Other witnesses had spoken of the client being quiet and withdrawn, but this was the first time someone had offered a perspective that invoked such strong emotional terms.

and depth of these human interactions that the defense discovers the texture of reality in the defendant's being—his pain and potential, and all that lies in between.

Finally, explained choice provides the superior framework for investigating mitigating possibilities for the defendant's life post-trial, including evidence of his promise for redemption and rehabilitation, as well as rebuttal evidence against future dangerousness.<sup>33</sup> As noted earlier, a determinist approach attempts to argue that forces compelling enough to induce the defendant to kill will never again induce him to indulge in his worst tendencies. Explained choice is consistent in honoring the integrity of the defendant's decision-making capacities through and through, including his ability to resolve to do good if given the conditions to flourish. Effective practitioners thoroughly investigate the possibilities for what these conditions might be. They realize that in exploring dynamics of severe family dysfunction, a sensitively conducted investigation that accords dignity to the defendant's loved ones can have the effect of "strengthening and restoring the individual's and the family's well-being,"<sup>34</sup> contributing to a viable system of supports after trial. The defense actively develops channels of communication between the client and members of his intimate community. Advocates explore educational and vocational opportunities to help the defendant actualize his potential, and foster relationships with institutional figures who can attest to his growth within a structured environment. In short, by attempting to procure understanding of the decisions he made in the past, explained choice justifies counsel's efforts to seriously and credibly explore the possibility that the defendant can choose to do better in the future.

## V. CONCLUSION

I conclude with a summary statement of the theoretical essence of compassion in capital mitigation, as I have come to understand it. Compassionate mitigation is evidence that a reasonable juror may take to *explain* how the choices a capital defendant made throughout life became actual possibilities of action for him. This evidence is mitigating, because it *dignifies the defendant's suffering* by honoring the complexity of his human agency, explaining his choices through the felt meanings of his individualized lived experience. Explained choice's combination of experiential suffering with volitional will, I contend, makes for a theory of compassionate mitigation that is conceptually complete. It is a theory that intuitively

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<sup>33</sup> See *Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding that the trial court improperly barred jailers' testimony of the defendant's good behavior after arrest for the capital offense as mitigating evidence of his future adaptability to prison life); ABA GUIDELINES, *supra* note 2, at 1062 ("[F]uture dangerousness is . . . at issue in virtually all capital trials . . . . Accordingly, counsel should give serious consideration to making an explicit presentation of information on this subject.") (footnote omitted) (internal quotation marks omitted).

<sup>34</sup> Emily Williams, *Mitigating Death*, 18 CORNELL J. L. & PUB. POL'Y 337, 376 (2008).

appeals to both the intellect and the emotions. It directly squares with the intensive practices of capital defense advocacy and the constitutional requirements that inform them. And it resonates with the foundational assumptions of our legal system as well as with popular ethical mores, recognizing that the capital sentencing process will tend to favor the destinies of those human beings who are able to exercise some control over their own.